No. 7967

United States Circuit Court of Appeals

For the Ninth Circuit

JUNG YEN LOY,
Appellant,

vs.

EDWARD W. CAHILL, as Commissioner of Immigration and Naturalization for the Port of San Francisco,
Appellee.

BRIEF OF APPELLANT.

STEPHEN M. WHITE,
550 Montgomery St.,
San Francisco, Calif.
Attorney for Appellant.

Parker Printing Co., 545 Sansome Street, San Francisco

Index

Table of Cases

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STATEMENT OF CASE.

This is an appeal taken from the order of the District Court of the Northern District of California, Southern Division, denying a petition for a writ of habeas corpus (Tr. of R. p. 44).

FACTS OF CASE.

The appellant, a male of Chinese descent, was born in China on October 28, 1924. Upon arrival from China, he applied for admission to the United States under a citizenship status, claiming that he was the

son of Jung Goey Fook, an American citizen (Section 1993 of Revised Statutes). The application for admission was denied both by a Board of Special Inquiry and, upon appeal, by the Secretary of Labor.

It is conceded that the appellant is the son of his claimed father, Jung Goey Fook; it is, however, said that the evidence does not satisfactorily establish that Jung Goey Fook is an American citizen (Immigration file, Exhibit "A", pp. 52-51, Finding and Decision of Secretary of Labor).

The immigration records establish that the appellant's father, Jung Goey Fook, was first admitted to the United States in September, 1909, and has made four trips to China, as follows: departed in October, 1913, and returned in July, 1914; departed in February, 1921, and returned in June, 1922; departed in December, 1923, and returned in April, 1925; departed in January, 1933, and returned in July, 1934 (Tr. of R. p. 14). He was admitted in the first instance as an American citizen, upon the ground that his father, *Jung Foo Wan,* was a native born citizen of the United States, and, on the occasion of each departure from and return to the United States, his American citizenship was reaffirmed. In December, 1931, Jung Goey Fook's oldest son, Jung Hong Loy, was admitted to the United States as a citizen, his citizenship having been conceded upon the basis of the citizenship of his father (Immigration File, Exhibit "D", p. 1). On June 5, 1917, Jung Goey Fook registered at Mason City, Iowa, for the military draft as an American citi-

zen (Decision of Secretary of Labor, Immigration File, Exhibit "A", p. 52).

At the hearing before the Board of Special Inquiry, the appellant testified that his paternal grandfather is *Jung Wing Hong* and not *Jung Foo Wan,* the native born citizen, whom the immigration authorities found and conceded in September, 1909, to be his father's father, and, solely, upon the basis of this testimony, both the Board of Special Inquiry and the Secretary of Labor have entered an adverse decision upon the question of the appellant's father's citizenship.

ARGUMENT.

The immigration authorities, in concluding that the appellant's father is not an American citizen, have acted unreasonably and unfairly.

Where a substantial claim of citizenship is presented "the Court will scrutinize the proceedings with great care to the end that American citizens shall not be unjustly deprived of this citizenship."

In the case of *Flynn ex rel Lum Hand v. Tillinghast,* 62 Fed. (2d) 308, at page 310, the Court said:

> "* * *. It is well settled that, when a claim of citizenship, which is more than colorable and presents a real question, is denied by the Immigration tribunals, the courts will scrutinize the proceedings with great care to the end that American citizens shall not be unjustly deprived of their citizenship. * * *. In the present case the reasons on which the immigration tribunals rejected

> the evidence offered on behalf of Lum Ack Wei seem to us quite insufficient. Their action was unreasonable and arbitrary. It 'was contrary to the "indisputable character of the evidence".' Lamar, J., Interstate Commerce Commissioner v. Louisville & Nashville R.R. Co., 227 U. S. 88 at page 91, 33 S. Ct. 185, 187, 57 L. Ed. 431."

In the case of *Young Len Gee v. Nagle,* 53 Fed. (2d) 448, C. C. A. 9th, the Court, at page 450, said:

> "* * *. It is not that we are substituting our judgment on the admitted evidence for that of the Board; it is rather that the weight of evidence in support of the claimed relationship is so strong, and is supported by those imponderables of which the Board may take cognizance, that any failure to recognize the claimed relationship is a purely capricious and arbitrary action on the part of the Board."

The immigration authorities must base their decision upon the entire evidence in the case (*Wong Chow Gin v. Cahill,* No. 7865, C. C. A. 9th, decided November 12, 1935; *Chung Pig Tin v. Nagle,* 45 Fed. (2d) 484, C. C. A. 9th).

The appellant testified that *Jung Foo Wan* is not, in fact, his paternal grandfather, but that his father is really the son of one *Jung Wing Hong;* that his father bought the paper of one of *Jung Foo Wan's* sons and posed as a son of that man when he came to the United States (in 1909); that his mother told him these things and instructed him not to say anything about the same (Tr. of R. pp. 16-21). The mother, of course,

had no personal knowledge of the paternity of the appellant's father and of the conditions under which the latter came to the United States as a boy of about sixteen (16) years of age. The source of her information is not disclosed and, at most, it was hearsay and the appellant's testimony being based upon her information was clearly hearsay of hearsay.

Testimony as to matters of pedigree of family history forms an exception to the hearsay rule only where the persons whose opinions and declarations are relied upon "are most likely to be well informed as to the facts" (*Lee Choy v. U. S.,* 49 Fed. (2d) 24, at page 27, 2nd. col., C. C. A. 9th).

It is true that judicial rules of evidence are not applicable to immigration proceedings and that hearsay testimony is admissible (*Li Bing Sun v. Nagle,* 52 Fed. (2d) 1000, C. C. A. 9th; *Kjar v. Doak,* 61 Fed. (2d) 566, C. C. A. 7th). The question, however, with which we are concerned, does not necessarily involve the admissibility of hearsay testimony, but rather the question of whether or not the immigration authorities have acted reasonably and fairly in accepting the hearsay testimony of appellant, as to the identity of his paternal grandfather, over the testimony and evidence of record in support of the American citizenship of his father.

As between the hearsay testimony of the appellant, on the one hand, and the prior executive decisions of the immigration authorities establishing the appellant's father's citizenship on the other hand, the executive decisions are more *persuasive.*

In the case of *Grant Bros. Constr. Co. v. U. S.*, 232 U. S. 647, 34 Sup. Ct. Rep. 452, 58 L. Ed. 776, the Supreme Court, at page 776 (L. Ed.) said:

> "Over the defendant's objection, the decision of the board of special inquiry was admitted in evidence as tending to prove that the forty-five men were aliens, and it is said that this was error because the defendant was not a party to the proceeding. One of the questions committed by law to the board for decision, subject to an appeal to the Secretary of Commerce, was whether the men were aliens. The document admitted in evidence disclosed that, after a hearing, the board determined that question in the affirmative, and that the men acquiesced by waiving their right to appeal. In that way their status as aliens was conclusively established as between themselves and the United States. It is true that the defendant was not a party to that proceeding and that, as a general rule, a judgment binds only the parties and their privies. But it is equally true that a judgment in a prior action is admissible, even against a stranger, *as prima facie,* but not conclusive, proof of a fact which may be shown by evidence of general reputation, such as custom, pedigree, race, death, and the like, *and this because the judgment is usually more persuasive than mere evidence of reputation.*"

Although the action of the immigration authorities, in affirming the appellant's father's citizenship on, at least, ten occasions, including his admission in the first instance in 1909, the occasions when he departed

from and returned to the United States and the occasion of the admission of his oldest son, Jung Hong Loy, is not *res adjudicata, White v. Chan Wy Sheung,* 270 Fed. 764, nevertheless, it must be given *prima facie* effect (*Chin Gim Sing v. Tillinghast,* 31 Fed. (2d) 763; *Ex Parte Chin Yoke Hing,* 291 Fed. 274; *Ex Parte Lee Hung Wong,* 29 Fed. (2d) 768; *In re Goon Bon June,* 13 Fed. (2d) 264; *U. S. v. Chin Len,* 187 Fed. 544). There is no evidence to dispute the presumption in favor of the appellant's father's American citizenship. Taking the testimony of the appellant, it, at most, might tend to prove that his father is the son of *Jung Wing Hong,* rather than of *Jung Foo Wan,* the native born citizen whom the immigration authorities found in 1909 to be the appellant's father's father. But, the appellant's father's American citizenship would not necessarily be inconsistent with his relationship to *Jung Wing Hong,* as the latter might be a native born American citizen, the same as *Jung Foo Wan.* Unless, therefore, it was proved that *Jung Wing Hong* was an alien, the prima facie presumption in favor of the appellant's father's American citizenship would remain. No such proof was offered.

The prior executive decisions of the immigration authorities were based upon evidence, which would establish in the mind of a reasonable person that the appellant's father was the son of *Jung Foo Wan.* Let us, now, consider the evidence.

On May 17, 1909, Jung Foo Wan, on the occasion of the application for admission of his oldest son, Jung Goey Eng, testified, as follows:

"* * * * * *

Q. Are you married?

A. Yes, twice—my first wife's name is Wong Shee, a bound foot woman, 37, she died K. S. 31, the middle of the 5th. month. I married again K. S. 32-7-2. My second wife's name is Leong Shee, a natural foot woman, 23, still living.

Q. How many children did you have by your second wife?

A. One boy, Jeong Ting Wee.

Q. How many children by your first wife?

A. Four boys and one girl. My girl is Jeong Sen Lin, 11. My boys—Jeong Goey Eng, 19, born K. S. 17-11-1 in Chow Young Village, Hoy Ping District.

Q. Is that village known by any other name?

A. No other name.

Q. Where is Chung Lee?

A. This same place called by that name.

Q. When you testified before you said Chung Lee, now you say Chow Yung.

A. Chow Yung is the regular name—Chung Lee is only on account of the family—Chung (Jeong).

Q. What is your second boy's name?

A. *Jeong Goey Fook, 17, in China.*

* * * * * * *."

Immigration file, Ex. "F", p. 8.

(Note: Jeong or Jung Goey Fook is the name of the applicant's father.)

As an applicant for admission, Jung Foo Wan's son, Jung Goey Eng, testified on May 14, 1909, as follows:

"Q. Where were you born?
A. Chow Yung Village, Hoy Ping District.
Q. What is your father's name?
A. Jeong Foo Wan.
* * * * * * *
Q. What is your mother's name and age?
A. Wong Shee, natural feet, age 37; she died K. S. 31-5-15.
Q. How many brothers and sisters have you?
A. 4 brothers and one sister.
(Sister) Jeong Suey Lin, 11.
Jeong Gooey Fook, 17, in China.
Jeong Gooey Yee, 15, born in China.
Jeong Gooey Fong, 13, in S. F. Came to U. S. in K. S. 34-11.
Jeong Ting Wee, in China.
* * * * * *."

Immigration file Ex. "F", p. 7.

On January 6, 1909, Jung Foo Wan, on the occasion of the application for admission of another son, Jung Goey Fong, testified as follows:

"* * * * * * *.
Q. How many children did you have by Wong Shee?
A. 4 sons, one daughter.
Q. Give me the name of your oldest boy.
A. Jeong Goey Din, 18, born K. S. 17-11-1.
* * * * * *.
Q. The name of the next boy.
A. *Jeong Goey Fook, 16, born K.S. 19-5-15.*
* * *."

Immigration File Ex. "K", p. 8.

As an applicant for admission, Jung Goey Fong, testified on January 6, 1909, as follows:

"* * * * * *

Q. When and where were you born?

A. K.S. 22-11-2 (Dec. 26, 1896.) in Chung Lee Village, Hoi Ping District, China.

* * * * * *.

Q. What is your father's name?

A. Jeong Foo Wan; Jeung Gin Bing; 35.

* * * * * *.

Q. What is your mother's name?

A. Wong Shee, natural feet, 36, died K.S. 31-5-15.

Q. Who did you live with after your mother died?

A. Stepmother, Leong Shee, natural feet, 21 or 22 years old.

Q. How many brothers or sisters have you by your own mother?

A. 3 brothers; no sisters. Jeong Goey Ding, 18, working in Lee Yuk's store in Sew Gew Market; *Jeong Goey Fook,* 16, at school in China; Jeong Goey Kee, 14, at school in China.

* * * * * *."

Immigration file Ex. "K", p. 4.

On December 26, 1909, Jung Foo Wan, on the occasion of the application for admission of another son, Jung Goey Gay (Kee), testified that he had a son by the name of *Jeong Goey Fook;* on the same occasion Jung Goey Gay testified that he had a brother by the name of *Jeong Goey Fook* (Immigration file, Ex. "G", p. 8 and p. 6). Jung Foo Wan died at Mason City, Iowa, in 1917. Thereafter, three other sons came to the United States. These sons were Jung Tin Woey,

who was admitted on June 12, 1921, Jung Tye Dow, who was admitted on April 3, 1925, and Jung Gock Woey, who was admitted on February 14, 1930 (see decision of Board of Special Inquiry, Immigration file, Ex. "A", pp. 30-31). The records on file in the cases of these three sons of *Jung Foo Wan* disclose that the appellant's father, Jeong (Jung) Goey Fook, was consistently identified and mentioned as a son of *Jung Foo Wan.*

Thus, on no less than six occasions, commencing in January, 1909, in proceedings in which the appellant's father was not an interested party, he has been identified and mentioned as a son of *Jung Foo Wan.* From the repeated assertions of Jung Foo Wan and six of his sons, Jung Goey Eng, Jung Goey Fong, Jung Goey Gay, Jung Tin Woey, Jung Tye Dow, and Jung Gock Woey, it must, we submit, be taken as proven that Jung Foo Wan had a son by the name of *Jung (Geong) Goey Fook, who was 16 or 17 years old in 1909 and who was born in Chung Lee Village, China.*

Gung You v. Nagle, 34 Fed. (2d) 848, C. C. A. 9th;

Louie Poy Hok v. Nagle, 48 Fed. (2d) 753, at page 755, C. C. A. 9th;

Johnson v. Ng Ling Fong, 17 Fed. (2d) 11, C. C. A. 1st;

Ng Yuk Ming v. Tillinghast, 28 Fed. (2d) 547, at page 548, C. C. A. 1st.

In the case of *Gung You v. Nagle,* supra, the Court said:

"* * * . The evidence taken at long intervals and covering the entire life of Gung You, in

fact evidence taken concerning the marriage of the father, Gung Sam, concerning his departures to and return from China, clearly indicate that in the ordinary course of nature a son or daughter would be born about the time Gung You was born. The arrival of this son was duly chronicled in the records of the immigration service, by the sworn testimony of the alleged father, of his two brothers, uncles of the appellant, and of his two older sons. Thus the testimony of five witnesses given on different occasions, when the subject was purely incidental to the matter under investigation, confirms the ordinary course of nature. To reject this evidence under the circumstances would be equivalent to a refusal to hear them at all, and would be a flagrant disregard of the fundamental principles for the administration of justice."

In *Louie Poy Hok v. Nagle,* supra, the Circuit Court for this Circuit said:

"* * * in the instant case the cumulative effect of the repeated assertions by the father and the previously entered alleged brothers that there was a third son, Louie Fung Leung, born October 1, 1909, certainly go farther than a mere indication that the three were suffering from a delusion; the effect of the testimony in the mind of any reasonable man must be to create the belief that there was a third son somewhere in the offing."

There is no question that the appellant's father is named Jung (Jeong) Goey Fook, that he was 16 or

17 years old in 1909 (he is now 41 or 42) and that he was born in Chung Lee Village, China. As we have pointed out, it must be conceded that *Jung Foo Wan* had a son, who met the description of the appellant's father. If, therefore, the appellant's testimony that his father is the son of *Jung Wing Hong* be correct, it would follow that there existed two individuals, each answering to the same description, as to name, age and place of birth, one of whom was the son of *Jung Foo Wan* and the other of whom was the son of *Jung Wing Hong.* To say the least, such a coincidence would be strange. The fact, however, that *Jung Foo Wan* had a son of the description of the applicant's father has been established as a matter of law and reason. *Gung You v. Nagle,* supra; *Louie Poy Hok v. Nagle,* supra, whereas there is no basis whatsoever to hold that *Jung Wing Hong* had such a son, other than the hearsay testimony of the appellant which was based upon hearsay information furnished him by his mother.

Considering, therefore, the entire evidence of record, we find, first, that the appellant's father, Jung Goey Fook, has been conceded by the immigration authorities to be an American citizen, on ten occasions and, secondly, in proceedings in which he was not an interested party, Jung Goey Fook has on at least six occasions, extending over a period of about twenty-five (25) years, been identified and mentioned as a son of Jung Foo Wan by Jung Foo Wan and six sons of the latter. Moreover, it is conceded that Jung Goey Fook met his obligations as an American citi-

zen by registering for the military draft in Iowa in 1917. Such powerful evidence in favor of Jung Goey Fook's American citizenship may not be arbitrarily disregarded.

"The mere hearing of witnesses by an officer is of no avail to a party, if the evidence of competent witnesses is to be entirely disregarded." (*Gung You v. Nagle,* 34 Fed. (2d) 848, at page 851, C. C. A. 9th.)

In the case of *Flynn ex rel. Chin She Yin v. Tillinghast,* 56 Fed. (2d) 317, C. C. A. 1st, the facts disclosed that an alleged brother of an applicant for admission testified that the applicant was an adopted, rather than a natural son of the alleged father. The Court said:

> "The petitioner's claim was rejected by the immigration tribunals chiefly for the reason that one of the alleged brothers, Chin See Go, when testifying in his own case in 1921, said that this petitioner was an adopted child of the alleged father and mother, and was then just beginning to walk and was not yet able to talk. The real question is whether this statement casts such doubt on the petitioner's case as to justify rejecting his claim. At the time Chin See Go gave his testimony he was eleven years old. He at first testified that he had two brothers by the same father and mother. The suggestion that one of the brothers might have been adopted was made to him by the examining officials, and he agreed to it. * * *.
>
> The petitioner and his witnesses say that he was born in December, 1914. If so, he was about seven years old in 1921 at the time when Go tes-

tified. The child described by Go could not have been more than three years old—at least four years younger than the petitioner. Such a difference between the age claimed and the real age would be obvious. No such discrepancy was noted by the immigration officials; apparently the petitioner's existence and age are strikingly confirmed by official records in the Immigration Department. In 1915 a brother of the alleged father testifying in official proceedings in his own case said that his brother (the present alleged father) had told him he had a son born in 1914. The first official proceeding in which such a son could have been mentioned was that of 1921 above referred to. At that time the alleged father testified consistently with his present story, and said that Go's testimony, which was brought to his attention, was entirely mistaken, and that his younger son, the present applicant, was six or seven years old and his own child. The petitioner has been continuously and consistently mentioned in several official proceedings since that time.

We do not think that the powerful evidence in the petitioner's favor could reasonably be regarded as outweighed by the statements of an eleven-year old boy in another proceeding which were at the time declared erroneous by the alleged father and which are now repudiated by the witness as a mistake due to childish ignorance. An American boy eleven years old would probably not know the meaning of "adoption", and there is nothing to indicate that such knowledge can be attributed to a Chinese child of that age. Moreover, in his former testimony Go said that he first saw the petitioner as a baby in his mother's arms.

It seems certain that the petitioner has been a member of the alleged father's family practically all his life. The direct oral testimony as to his birth and relationship is very strongly corroborated by the official records of the proceedings in 1915, and the subsequent proceedings.

The attention of the immigration tribunals seems to have been directed to the discrepancies which their examinations had developed rather than to the evidence as a whole. There is no indication in their decisions that they at all considered or appreciated the extremely strong evidence in the petitioner's favor. We are forced to the conclusion that their finding was an arbitrary and unreasonable one, and that on the evidence submitted no conclusion was fairly open except that the petitioner is the son of Chin Hong Goon as claimed."

In all essentials, the case of *Ex parte Cheung Tung,* 292 Fed. 997, D. C., is squarely in point. There the facts disclosed that a paternal uncle of the applicant had testified that his brother, who was the alleged father of the applicant, had no son answering the description of the applicant. The late Judge Dietrich said:

"Assuming, though not finding, that the deponent was Cheung Foo's brother, and imputing absolute verity to his alleged deposition, the immigration officers rejected the direct and positive testimony of four witnesses to the effect that Cheung Foo had four instead of two sons and that petitioner was one of them. One need only refer

to the decision of the Board of Review to see that this nondescript of incompetent evidence was given not merely incidental, but controlling weight and that largely if not entirely because of it petitioner was denied admission.

* * * * * * *

The use made by the immigration officers of the alleged testimony of Cheung Hung or Kong Hung, to which petitioner excepts, was manifestly unfair and was inconsistent with the fundamental principles embraced in the conception of due process of law."

Chin Gim Sing v. Tillinghast, 31 Fed. (2d) 763.

The immigration authorities acted unfairly in omitting to direct the attention of the appellant's father to the testimony of the appellant.

Insofar as the father was concerned, he never knew, until after the hearing had been completed, that the appellant had testified that his (appellant's) paternal grandfather was *Jung Wing Hong,* rather than *Jung Foo Wan* (Testimony of Jung Goey Fook, Tr. of R., pp. 36-43). The reason for the unfair action of the immigration authorities, in failing to direct the attention of the father to the appellant's testimony is not disclosed, but, manifestly, by such action, the father was foreclosed of any opportunity to explain or answer the appellant's testimony.

In *Kwock Jan Fat v. White,* 253 U. S. 454, 40 Sup. Ct. 566, 64 L. Ed. 1010, the Supreme Court said:

"The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and

> persons of Chinese descent. It is a power to be administered, *not arbitrarily and secretly, but fairly and openly,* under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined, in the cases cited, to prevent abuse of this extraordinary power. * * *."

In *Chin Quong Mew ex rel. Chin Bark Keung v. Tillinghast,* 30 Fed. (2d) 684, C. C. A. 1st, the Court said:

> "The applicant was not informed by the Board that such evidence would be received and considered and was given no opportunity to refute or explain it. It was undoubtedly used and given weight by the Board in reaching its conclusion. Such conduct was highly prejudicial and rendered its decision unfair."

In *Lewis ex rel. Lai Thuey Lem v. Johnson,* 16 Fed. (2d) 180, at page 182, C. C. A. 1st, the Court said:

> "While hearsay evidence may be used (Tang Tun v. Edsell, 223 U. S. 673, 32 S. Ct. 359, 56 L. Ed. 606), the applicant must have an opportunity to explain or rebut it. See Kwock Jan Fat v. White, 253 U. S. 454, 40 S. Ct. 566, 64 L. Ed. 1010."

In view of the secrecy which attended the action of the immigration authorities in keeping from the father the testimony of the appellant and in failing to direct his attention thereto it could hardly be said that the hearing was conducted "fairly and openly". It is not sufficient answer to say that the omission was

cured when, after the hearing was completed, the immigration files were thrown open for the inspection of the appellant's attorney. The fact would remain that the Board of Special Inquiry entered its decision without affording the appellant's father an opportunity to answer the alleged adverse testimony of the appellant.

In the case of *Mahler v. Eby,* 264 U. S. 32, 44 S. Ct., Rep., 68 L. Ed. 549, at page 557 (L. Ed.), the Supreme Court said:

> "* * *. It is suggested that if the objection had been made earlier, it might have been quickly remedied. There was no chance for objection afforded the petitioners until after the warrant issued, in the petition for habeas corpus. The defect may still be remedied on the objection made in this court."

CONCLUSION.

We submit that the immigration authorities, in denying the American citizenship of the appellant's father, have acted unreasonably and unfairly and in arbitrary disregard of the entire evidence of record. Moreover, they have acted unfairly in accepting hearsay testimony, upon the question of the paternity of the appellant's father, without affording the father an opportunity to meet the testimony.

It is respectfully asked that the order of the Court below be reversed.

STEPHEN M. WHITE,
Attorney for Appellant.

Dated: December 18, 1935.